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March 18, 2010

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: National Rural Electric Cooperative Association ("NRECA") Notice of Ex Parte Presentation, WC Docket No. 07-245

Dear Ms. Dortch:

On behalf of the state cable associations listed in Attachment A, we write to address a presentation made on March 8, 2010 by the National Rural Electric Cooperative Association ("NRECA") and memorialized in its March 9, 2010 *ex parte* filing.1 We also offer a different perspective that is relevant to, and reaffirms, the wisdom of the Commission's recommendation to eliminate the cooperative and municipal exemption contained in the Federal Pole Attachment Act.2

The picture that NRECA paints is at odds with reality and leaves a misimpression about the harmful effects of continuing the cooperatives' (and municipalities') 32-year old exemption

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1 The *ex parte* was also filed in the National Broadband Plan dockets, GN Docket Nos. 09-47, 09-51, and 09-137. In light of the Broadband Plan's release Mar. 16, 2010, this filing is limited to WC Docket No. 07-245.

2 Cooperatives and municipally owned utilities are excluded from Section 224 through the section's definitions. "Utility" as used Section 224 excludes person "who is cooperatively owned or any person owned by ... any State", 47 U.S.C. § 224(a)(1); and "State" means "any political subdivision, agency or instrumentality thereof." Id., § 224(a)(3).

from pole attachment regulation. Assuming that this loophole ever made sense, it does no more. Exclusion of poles owned by co-ops and municipalities from the pole attachment law continues to be a barrier to the deployment and expansion of broadband and other services by cable operators.[3]

NRECA began its March 9, 2010 submission by asserting that (in 2003) only about 25% of co-op-owned poles had communications attachments.[4] It did so, presumably, to show that poles with communications attachments comprise a relatively small part of the pole-rate equation and that its members cover a vast geographic territory with relatively few customers.

But consider this: if only 25% of co-op poles had communications attachments, that means that either (a) 75% of cooperative members have no wireline phone service, or cable service, or (b) that all communications facilities in cooperative service areas are underground or on some other pole line (which would be extremely rare, if it existed at all). Even assuming that the actual percentage of cooperative poles that contain communications attachments is relatively small, that would suggest that cooperatives have been extremely inhospitable to communications companies. That is certainly the case. And this is why the cooperative and municipal exemptions should be terminated, not extended.

NRECA further states, "Cooperative attachment rates are designed to recover actual costs associated with providing attachment space on poles."[5] In some cases, rates are designed to cover only actual costs. But in too many instances, while "actual costs" is the claim, the reality is that a true cost-based rate would be many multiples *lower* than the ones that the unregulated pole owners seek to charge.

For example, in one case pending before the Arkansas Public Service Commission ("APSC") (one of a few states that regulate cooperative pole rates), the chasm between a cooperative's "actual costs," and, actual costs, has been clearly demonstrated.

The Arkansas Valley Electric Cooperative Corporation ("AVECC") is attempting to raise the rate charged to Cox Communications from $12.50 to between $22 and $32. AVECC provided cost and plant data that, when input to the FCC's cable formula, produced a cost-based rate of $3.30.[6] The FCC's cable rate methodology has been utilized by many state commissions

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[3] FCC NATIONAL BROADBAND PLAN 112 (2010).

[4] Letter from David Predmore, Corporate Counsel, National Rural Electric Cooperative Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, (March 9, 2010) ("NRECA Letter"), *available at* http://fjallfoss.fcc.gov/ecfs/comment/view?id=6015542122.

[5] *Id.* at 2.

[6] CoxCom, Inc. v. Arkansas Valley Elec. Coop. Corp., No. 09-133-C, Doc. No. 14, p. 33 (Ark. Pub. Serv. Com. 2009), Testimony of Patricia D. Kravtin, *available at* http://www.apscservices.info/pdf/09/09-133-c_14_1.pdf.

that regulate pole rates as well as in hundreds of cases adjudicated at the FCC for more than 30 years. And there is no legal dispute that the rate rules under Section 224(d) accomplish what was intended: to fully compensate[7] pole owners for the use of their property.[8]

The Arkansas case shows that cooperatives' true costs are not materially different than those of investor-owned utilities. Indeed, as the *Arkansas Valley* case shows, cooperatives' pole-related costs may be actually considerably *lower* than those of IOUs.[9] The fact that millions of these poles today are exempt from cost-based rates means that unnecessarily high inputs are built into rural broadband deployment costs.[10]

There are many examples where unregulated pole rates far exceed actual costs, and certainly what regulated, but for-profit investor-owned pole owners charge. Many of these examples are in Tennessee. The majority of electric distribution to Tennessee's electric customers is performed either by exempt cooperatives or exempt municipally-owned electrics.

There are, however, some Tennessee pole owners whose rates are regulated at the FCC. The average rate for those regulated companies is $5.80 per pole.

By contrast, rates charged by Tennessee's unregulated electric cooperatives run as high as $19.61, with the top rate for a municipal electric company at $39.70. Unfortunately, co-op and muni pole rates at or above $15.00 in Tennessee (approximately double or triple of regulated

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[7] The rates determined under the FCC's pole formula have been deemed fully compensatory under the constitution's "takings" clause. *See* Alabama Power Co. v. FCC, 311 F.3d 1357 (11th Cir. 2002); Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co., 534 U.S. 327, 337 (2002).

[8] Investor-owned utilities subject to Section 224 have on numerous occasions unsuccessfully sought multiples of what turned out to be the correctly adjudicated rate for an attachment. *See, e.g.*, Cavalier Tel. LLC v. Virginia Elec. & Power Co., 15 FCC Rcd. 17962 (2000) (dropping utility's pole attachment charge from a proposed $38 to $5.12); Florida Cable Telecomms. Ass'n, Inc. v. Gulf Power Co., 18 FCC Rcd 9599 (2003) (drop from $38.06 to $4.16-4.93/year).

[9] These outlier rates and inappropriate attribution of pole costs to broadband providers are all the more troubling because, as the NRECA itself points out, the majority of co-ops are exempt from federal income tax, which requires operation at cost. Co-ops supposedly also are subject to equitable cost and accounting allocation which is supposed to eliminate cross subsidization. These characteristics should lead to *lower* rates for co-op attachers than those obtained from investor-owned utilities. Instead, many co-ops propose much higher rates that the loophole permits on a take-it-or-leave-it basis.

[10] *See* FCC NATIONAL BROADBAND PLAN 110-12 (2010). The APSC case is also instructive—and representative—of the sort of power that cooperatives can exercise and occasionally abuse. When Cox balked at paying the higher rate, AVECC terminated Cox's agreement and instructed Cox to proceed with the removal of its lines. Fortunately, after Cox filed its complaint with the APSC, that commission ordered AVECC to take no action with respect to Cox's facilities. *See* CoxCom, Inc. v. Arkansas Valley Elec. Coop. Corp., No. 09-133-C, Doc. No. 1 (Ark. Pub. Serv. Comm'n 2009), *available at* http://www.apscservices.info/pdf/09/09-133-c_1_1.pdf; *id.*, Order No. 1, *available at* http://www.apscservices.info/pdf/09/09-133-c_2_1.pdf.

pole rates) are not unusual. In keeping with this trend, one large city-owned electric company summarily announced its intention to raise its pole rate from $10.00 to $21.00.

Similar situations exist in other states. In San Antonio, Texas the municipal electric provider, CPS Energy, for years has charged cable operators and others rates ranging from more than $15.00 to nearly $20.00 per pole, while asserting that its "costs" would justify a rate approaching $30.00. By contrast, investor-owned utilities in the state charge *regulated* pole rates that are a fraction of these municipal rates.[11] The same is true in Florida, where some municipal pole rates are approximately $30.00, while investor-owned pole owners are in the $7.00 range.

Likewise, in Virginia, an investor-owned electric company, Allegheny Power, plans to sell certain of its distribution assets to a local electrical cooperative that today charges $30.00 per pole. Comcast, the cable operator there, pays approximately $5.00 to attach to Allegheny Power's poles. But once the sale is complete, Comcast will have no choice but to pay $30 for the very same poles for which it today pays only $5.00.

In California, the City of Los Angeles Department of Water and Power as recently as 2005 charged cable operators a rate of $10.00 per pole. Today the rate exceeds $30.00. Other municipal utilities recently announced rates even higher than that, with one unregulated California pole owner that today charges *in excess of $60.00 per pole per year*.

Again, contrast these unregulated rates to those of poles owned by companies like Verizon and AT&T, which are at or under $5.00, and Southern California Edison, a regulated investor-owned utility, which is under $10.00.

While many businesses, including broadband, are fundamentally competitive and becoming increasingly so, poles by their nature are bottleneck facilities.[12] There is nothing inherently different about poles, or their administration and maintenance by an IOU on the one hand or a cooperative and a municipality on the other, that explains triple-digit rate differentials. The difference, simply, is the absence—or presence—of regulation.

In the worst cases, high pole costs extinguish broadband deployment and put cable systems out of business. For example, in Perryville and Greers Ferry, Arkansas, the cable operator, Alliance Communications, was forced to shut down its systems in those communities when the local electric cooperative (the largest in Arkansas) raised rates to more than $15.00 per pole (as well as imposing a host of other exorbitant costs). But this is not limited to small operators. When the unregulated electric pole owner in Cookson Hills, Oklahoma recently presented Cox Communications with a pole rate of $25.00, Cox was forced to remove its facilities from the poles, leaving significant parts of the community without broadband.

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[11] *See* Petition of CPS Energy For Enforcement Against AT&T Texas and Time Warner Cable San Antonio LP, Tex. PUC Docket No. 36633, SOAH Docket No. 473-09-5470.

[12] *See* Alabama Power v. FCC, 311 F.3d 1357, 1361-63 (11th Cir. 2002).

This is just a small sample of cases across our members' service areas. But there are many more examples just like these. That is why the elimination of the municipal and co-op exemption is critical to meeting the goal of Universal Broadband.

Whatever reasons that may have animated the 1978 Pole Act's exclusion of co-ops and municipal pole owners from pole regulation, there is no reason to extend that exclusion. In its March 9, 2010 submission, NRECA cherry-picks portions of the legislative history leading up to the co-op/muni exclusions to explain why, 32 years later, those exclusions still make sense. But much has changed since then, including the effect of unregulated pole attachments on other important social goals like Universal Broadband.

For instance, NRECA cites the 1977 Senate Report that "cooperative utilities charge the lowest pole rates to CATV pole users" and that rates "are already subject to a decision making process based upon constituent needs and interests."[13] But as we have demonstrated here, and as the Commission has found in the National Broadband Plan, cooperatives and municipals do not charge the lowest rates: many charge the absolute *highest* rates.

Moreover, assertions about co-ops' incentives to make cable television services available to its members are outdated and not convincing. NRECA again cites the 1977 Senate Report's observation that because over-the-air television service is poor in rural areas, co-ops have the "added incentive to foster growth of cable television in their areas." Of course, with the advent of direct broadcast satellite service by the mid-1980s, co-op customers could obtain diverse programming without cable television, and DBS's earliest subscriber growth was in rural areas. So this "added incentive" is long gone.

In place of this "added incentive" there is actually an "added *disincentive*" to offer reasonable pole rates.

Cooperatives and municipals are not merely pole landlords, they are also broadband competitors—prioritized beneficiaries of grants from the Rural Utilities Service 2009 Broadband Initiatives Program; recipients, along with rural telcos, of more than a billion dollars for broadband deployment since 2000; and recipients of hundreds of millions (at least) of Department of Energy SmartGrid grants.[14] Having undergone a metamorphosis from provider to an even more richly subsidized competitor, co-ops cannot be viewed in the pole rate context as they were in 1977 or 1978.

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[13] NRECA Letter at 3 (citing S. Rep. 95-580, at 18 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 126).

[14] *See, e.g.*, U.S. Dep't of Agriculture, USDA Broadband Initiatives Program Round 1 Approved Projects as of February 17, 2010, http://www.broadbandusa.gov/files/BIP_Round1_ProjectSumm_Updated02172010.pdf; Press Release, U.S. Dep't of Energy, President Obama Announces $3.4 Billion Investment to Spur Transition to Smart Energy Grid (Oct. 27, 2009), *available at* http://www.energy.gov/news2009/8216.htm.

The combination of municipal ownership and high pole rates and municipal broadband competition presents a particularly troubling case. It is even more troubling when, as is the case today, pole rates are many multiples higher than what a cost-based rate would be; where the exempt electric provider provides video, voice and data in competition with private providers; *and*, where the pole owner also receives federal grants for SmartGrid grants and broadband, which, in some individual cases, have exceeded $100 million. It is not uncommon for a municipal utility that seeks to compete with the cable operator not only to raise pole rents, but to impose unreasonable non-rate terms and conditions on the operator. One large municipal utility not only charges a pole attachment rate that is twice that charged by the local investor-owned utility ($18.00 rather than $9.00), but for six months the municipal in this case has refused to process a single pole-permit application submitted by the cable operator.

While competition and a "greener," "smarter" electric grid are fundamentally good things, rigorous safeguards (like eliminating the municipal and cooperative exemption and expedited dispute resolution procedures with teeth) are necessary to ensure a viable (if not exactly level) playing field to facilitate broadband rollout to the very last customer.15

NRECA describes co-ops as playing "a vital role in economic development and carrying on the tradition of civic responsibility and local democracy." Whether or not this accurately characterizes the general state of co-ops today,16 there remains no policy reason to continue to exclude cooperatives and municipals from the reality check of cost-based rates. Tennessee Congressman Jim Cooper recently observed in the Harvard Journal of Legislation that:

> Too many electric co-ops have turned away from their historic role as exciting, pro-consumer organizations and have instead taken on deeply troubling anti-consumer behaviors. Ideally, co-ops will return to their roots voluntarily, but a legislative push will likely be necessary.17

While Representative Cooper was referring to co-ops generally, his observations apply equally to their conduct—as well as to that of municipal power companies—in the pole attachment context.

Cooperatives and municipal utilities have changed from their humble Depression-era origins. The vision of not-for-profit, cost-based pole rate providers often seems far from today's reality. Cooperatives control $112 billion in assets and $31 billion in member equity. For their

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15 *See* FCC NATIONAL BROADBAND PLAN 112 (2010).

16 *See* Jim Cooper, *Electric Co-operatives: From New Deal to Bad Deal*?, 45 HARV. J. ON LEGIS. 335, 339-40, 375 (2008) (detailing litany of management and problematic financial practices of electric cooperatives).

17 *Id*. at 375.

part, the municipals have assets of $200 billion.18 Compared to investor-owned utility assets of $700 billion,19 munis' and cooperatives' combined assets constitute the equivalent of about 40% of privately-owned utilities. This is hardly an insignificant part of the pole ownership picture, the broadband gateway—or, for that matter, the U.S. economy.

High pole costs translate to high inputs for broadband. And with co-op entry into broadband, the assumptions underlying the 1978 exclusion no longer hold true. Indeed, cable broadband providers now find themselves as virtual pioneers in providing critical new networked services in rural and other un- and underserved areas. This position is reminiscent of that of the electric cooperatives in their early years. And just as cooperatives needed Washington's attention through national rural electricification programs (such as the Tennessee Valley Authority and federal subsidies with roots in the Great Depression and New Deal), so too does broadband need federal attention today to reach its potential.

Cable operators' pioneer role was not achieved by riding the rails of government subsidy programs and guaranteed rates of return that are the hallmarks of the monopoly electric power and traditional telephone industry. Rather, cable, which is at its core and always has been a competitive business, has done so by finding new opportunities and successfully deploying its risk capital. To be clear, the FCC's recommendation to Congress to close the cooperative and municipal loophole is no subsidy to cable, the cooperatives' mantra notwithstanding: it is merely the even-handed rationalization of a regulatory regime that has been found time and again to fully compensate pole owners.20

Ending the exemption for poles that serve tens of millions of actual *and potential* cable and broadband consumers—which is a major gating factor to Universal Broadband—is long overdue.

Sincerely,

J. D. Thomas
Gardner F. Gillespie
Daniel L. Brenner

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18 NRECA, Co-ops by the Numbers, *available at* http://www.nreca.org/AboutUs/Co-op101/CooperativeFacts.htm (last viewed Mar. 17, 2010).

19 Cooper, *supra* note 16, at 338 n.18.

20 *See, e.g.*, Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co., 534 U.S. 327, 337 (2002).

ATTACHMENT A

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